A **RE FERDILIN ABDUL RAHMAN; EX P AFFIN BANK BHD**

HIGH COURT SABAH & SARAWAK, TAWAU
ALWI ABDUL WAHAB JC
[BANKRUPTCY NO: TWU-29NCC-456-12-2016]
5 JANUARY 2018

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BANKRUPTCY: *Creditor's petition – Notice of objection – Judgment debtor filed notice of objection against creditor's petition by judgment creditor – Hirer failed to make monthly instalments under hire purchase agreement – Whether judgment debtor a social guarantor – Whether all avenues exhausted to recover judgment debts from hirer – Whether there was failure to comply with Bankruptcy Act 1967, s. 5(3)*

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The hirer had entered into a hire-purchase agreement with the judgment creditor ('JC') where the latter had agreed to let to her on hire-purchase terms a unit of Toyota Hilux. The hirer had stopped making her monthly instalment to the JC after the Toyota Hilux was involved in an accident with total damage to it and beyond an economical repair. The JC obtained receiving and adjudication orders against the hirer and subsequently presented the creditor's petition ('CP') against the judgment debtor ('JD'). The JD filed the notice of objection against the presentation of the creditor's petition by the JC on the ground that the JD was a social guarantor and that the JC failed to satisfy the requirement of s. 5(3) of the Bankruptcy Act 1967 ('the Act') through a sworn affidavit showing to the court that all avenues had been exhausted to recover the judgment debts from the hirer. The Deputy Registrar ('DR') granted the order in terms of the JD's notice of objection and consequently ordered that the CP and bankruptcy notice ('BN') be set aside. Hence, the JC appealed.

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Held (dismissing appeal with costs):

(1) The JD was a social guarantor as both the JD and the hirer were relatives and the JD had agreed to become a guarantor upon request by the hirer on the understanding that the said Toyota Hilux was for personal use by the hirer. The Toyota Hilux was not used by the hirer to generate incomes or profits for her business. The JD's presumed knowledge that the hirer was self-employed without any fixed monthly income and the Toyota Hilux would be used by the hirer for her business of transporting oil palm fruits, was made by the JC without referring to some credible evidence. It was not a sworn statement in the form of affidavit to be filed and served on the opponent. It was only fair for this contention by the JC to put to the JD by way of affidavit and the JD would have the opportunity to state whether she had any knowledge on the status of the hirer's employment or otherwise in the form of an affidavit as well. (paras 4, 8 & 10)

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(2) The JC ought to show to the court by way of affidavits that all avenues had been exhausted by the JC to recover its debts. The filing of affidavit to satisfy the court pursuant to s. 5(3) of the Act was mandatory in nature. Instead of showing proof by way of affidavit, the JC had produced a letter dated 12 July 2017 addressed to the court stating that the principal debtor *ie*, the hirer could not be located at the given address which was the reason why it failed to recover the debts. However, the said letter only came into existence after the hearing on the CP. The letter dated 12 July 2017 was far from sufficient to satisfy the court pursuant to s. 5(3) of the Act as the letter was not a sworn statement of the JC or its representative. (paras 15-18)

Case(s) referred to:
Hong Leong Bank Bhd v. Khairulnizam Jamaludin [2016] 7 CLJ 335 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 5(3)
Bankruptcy Rules 1969, r. 18

For judgment creditor - Haris Alimudin; M/s Rahim Abdullah & Co
For judgment debtor - Darmin Achok; M/s Johari & Zelika

Reported by Suhainah Wahiduddin

JUDGMENT

Alwi Abdul Wahab JC:

Introduction

[1] The hirer, Roslina binti Tiri had entered into a hire-purchase agreement dated 26 March 2014 with the judgment creditor ("JC") where the latter had agreed to let to her on hire purchase terms a unit of Toyota Hilux bearing registration no. SD 9070 K ("Toyota Hilux"). The hirer had stopped making her monthly instalment to the JC after the Toyota Hilux was involved in an accident with total damage to it and beyond an economical repair. On 23 November 2016, JC obtained a receiving and adjudication orders against the hirer. In less than six months ie, on 13 April 2017, the JC then presented the creditor's petition ("CP") dated 13 April 2017 against the judgment debtor ie, Ferdilin binti Abdul Rahman ("JD").

Notice Of Objection (encl. 11)

[2] By encl. 11 dated 31 July 2017, the JD filed the notice of objection against the presentation of the creditor's petition by the JC on the ground that the JD is a social guarantor and the JC has failed to satisfy the requirement of s. 5(3) of the Bankruptcy Act 1967 ("the Act") through a sworn affidavit showing to the court that all avenues have been exhausted to recover the

judgment debts from the hirer. The JD's encl. 11 was opposed by the JC as it was the JC's contention that the JD was not a social guarantor and that it had complied with the said provision of the Act.

The Appeal

[3] On 4 October 2017, the learned Deputy Registrar ("DR") granted the order in terms of the JD's notice of objection under encl. 11 and consequently ordered that the creditor's petition and bankruptcy notice ("BN") be set aside. Hence, the JC appealed against that decision.

The Learned DR's Decision

[4] In granting the order in terms in favour of the JD to set aside the CP and BN, the learned Deputy Registrar ruled that the JD is a social guarantor as both the JD and the hirer are relatives and the JD agreed to become a guarantor upon request by the hirer on the understanding that the said Toyota Hilux was for personal use by the hirer.

[5] The learned Deputy Registrar also ruled that the JC had failed to satisfy the court that the JD was not a social guarantor as he was of the view that the Malaysian Palm Oil Board licence attached by the hirer to support her application for the said hire-purchase facility and the fact that the said Toyota Hilux was totally damaged beyond repair after an accident cannot be the basis to say that the JD is not a social guarantor.

Whether The JD Is A Social Guarantor

[6] Learned counsel for the JD submitted that in the circumstances of the present case, the JD falls under the definition of a "social guarantor" because she was guaranteeing the hirer in respect of the hire-purchase facility of the said Toyota Hilux for the hirer's personal use and not for the purpose of making profits.

[7] Learned counsel for the JC submitted otherwise that the JD is not a social guarantor as the hirer was doing the business of transporting the oil palm fruits for profits by virtue of the MPOB licence issued to the hirer (exh. "BBM1" of encl. 18). It was further submitted that the hirer was self-employed and doing the business of buying and selling of oil palm fruits as stated in her application for hire-purchase facility (exh. "BBM2" of encl. 18).

[8] Having seen and read both exhs. "BBM1" and "BBM2", I agree with the learned DR and the submission of learned counsel for the JD that in both documents, there is nothing stated that the said Toyota Hilux would be used by the hirer to generate incomes or profits for her business. By saying otherwise, learned counsel for the JC was only making assumptions without referring to some credible evidence just because the hirer was self-employed and without any fixed monthly income.

[9] Learned counsel for the JC also contended in his submission that since both the JD and the hirer are relatives, the JD must have known that the hirer was self-employed without any fixed monthly income and the subject matter of the hire-purchase would be used by the hirer for her business of transporting oil palm fruits. A

[10] In this regard, it is my view that the above contention on the JD's presumed knowledge is made without referring to some credible evidence. It is not a sworn statement in the form of affidavit to be filed and served on the opponent. In my view, it would only be fair for this contention by the JC be put to the JD by way of affidavit and the JD will have the opportunity to state whether she has any knowledge on the status of the hirer's employment or otherwise in the form of an affidavit as well. My point on the need for the JC to adduce evidence by way of affidavit leads to another issue in contention ie, whether the JC needs to file the affidavit to satisfy the requirement of s. 5(3) of the Act. B C

Whether There Is A Non-compliance Of s. 5(3) Of The Bankruptcy Act 1967 D

[11] The learned DR ruled that the JC has failed to comply with s. 5(3) of the Act in the sense that the JC did not prove to the satisfaction of this court that it has exhausted all avenues to recover debts owed to them by the JD.

[12] In the present case, it was the JC's contention that it had made all reasonable actions to recover the judgment debts from the hirer by proving that the repossession of the said Toyota Hilux was fruitless as it was totally damaged, a judgment had been entered against the hirer and the hirer had been adjudged a bankrupt. The JC further contended that there is no mandatory requirement for the JC to file a sworn affidavit at the hearing of the CP in order to satisfy the court that it had exhausted all avenues to recover the debts from the JD. E F

[13] I do not agree with the above contention as there is a clear authority from the apex court on this point ie, the Federal Court case of *Hong Leong Bank Bhd v. Khairulnizam Jamaludin* [2016] 7 CLJ 335. It was held as follows: G

> [34] In our judgment, a reading of s. 5(3) of the Act in the context of the purpose identified above would clearly advance the meaning that it would be sufficient compliance with s. 5(3) of the Act if a creditor shows by way of affidavit at the hearing of the creditor's petition that he has satisfied the requirement of s. 5(3) of the Act ... H

[14] The above case was referred to by both counsel in the appeal before me but learned counsel for the JC interpreted the above-quoted para. 34 of the said decision rather in a different way. He submitted that the said paragraph did not actually state that a creditor must show by way of affidavit in order to satisfy the court that it had exhausted all avenues to recover the debts but it merely states that it would be sufficient for that purpose to do so by way of affidavit, thus leaving it open to the creditor to prove it by some other methods. I

[15] What the JC did in the present case was that it wrote a letter dated 12 July 2017 addressed to the court stating that the principal debtor ie, the hirer could not be located at the given address which was the reason why it failed to recover the debts. With this reason together with all other actions taken by the JC as stated above, it had already exhausted all avenues to recover its debts.

[16] It must be noted that the said letter by the JC dated 12 July 2017 only came into existence after the hearing on the CP on 5 July 2017. Likewise, the JC's affidavit (encl. 18) enclosing exhs. "BBM1" and "BBM2" to oppose the JD's notice of objection in encl. 11 was filed on 16 August 2017 after the hearing of the CP. It was confirmed that there was no affidavit filed by the JC at the hearing of the CP to satisfy the requirement of s. 5(3) of the Act.

[17] Following the authority of *Hong Leong Bank Berhad (supra)*, the JC ought to show to the court by way of affidavits that all avenues had been exhausted by the JC to recover its debts. In my view, this is a minimum requirement imposed by s. 5(3) of the Act from my reading of the wordings of para. 34 of *Hong Leong Bank Berhad*'s case *(supra)* which stated that "it would be sufficient compliance with s. 5(3) of the Act if a creditor shows by way of affidavit at the hearing of the creditor's petition that he has satisfied the requirement of s. 5(3) of the Act …". In other words, it seems to me that the filing of affidavit to satisfy the court pursuant to s. 5(3) of the Act is mandatory in nature. Instead of showing proof by way of affidavit, learned counsel for JC produced the said letter dated 12 July 2017 to claim that it had pursued all avenues to recover its debts from the hirer.

[18] In my view, the letter dated 12 July 2017 produced by learned counsel for the JC is far from sufficient to satisfy the court pursuant to s. 5(3) of the Act as the letter is not a sworn statement of the JC or its representative.

Other Issues Raised In The Appeal

[19] During the proceedings before the learned DR, counsel for the JD informed the court that there were two notices of objection namely encl. 11 and encl. 13 which are similar in contents filed inadvertently by the JD to oppose the CP. Learned counsel for JD applied to the court to ignore the former notice of objection under encl. 11 and to rely on the latter notice under encl. 13. However, the learned DR proceeded with encl. 11 instead of encl. 13 to deal with the objection raised by the JD. Due to this mixed up on the identity of the two notices, learned counsel for the JC submitted that there was a clear misdirection by the learned DR.

[20] In my view, there is no prejudice caused to the JC as a result of the misdirection by the learned DR in considering encl. 11 instead of encl. 13. This is because, both encl. 11 and 13 bear similar prayers and contents objecting to the CP filed by the JC. Furthermore, there was no objection by learned counsel for the JC on the withdrawal application of one of the enclosures which obviously redundant due to the clerical mistake made unintentionally by the JD.

[21] The last issue raised by learned counsel for the JC was on the mode used by the JD in opposing the CP which should be by way of an application made under r. 18 of the Bankruptcy Rules 1969 and not by way of filing a notice of objection under encl. 11. There was no objection raised by the JC on the mode used by the JD to commence her objection to the CP before the learned DR. As such, the JC could not bring up this issue in this appeal as it should be raised as a point of law by way of preliminary objection before the learned DR prior to the hearing of encl. 11.

Conclusion

[22] For the foregoing reasons, I dismissed the appeal with costs of RM3,000 in here and before the learned Deputy Registrar subject to the payment of allocatur fee.